

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA,

17-CR-15-RJA

DECISION AND ORDER

v.

TYRONE PENNICK,

Defendant.

Defendant Tyrone Pennick has moved to disqualify this Court from proceeding with his sentencing, currently scheduled for March 27, 2024 at 10:00 AM. (Dkt. No. 219) The basis for the disqualification motion is that this Court's most recently hired law clerk, James P. Kennedy, Jr., was a member of the United States Attorney's Office for the Western District of New York, and in that capacity served as Criminal Chief for the Western District of New York (2007-2010); First United States Attorney (2010-2016); Acting United States Attorney (10/29/16-11/17/17); and United States Attorney (11/17/17-10/11/21). It was during this period of time that the United States Attorney's Office for the Western District of New York prosecuted defendant in the case of *United States v. Pennick, et al*, 10-CR-191, which indictment was dismissed against defendant on May 8, 2019. The indictment in the instant case against defendant, 17-CR-15, was issued during the time period that Mr. Kennedy served as Acting United States Attorney. According to defendant, "it is impossible to talk about the sentencing in this case without pulling in the information, allegations, and litigation from the previous, now-dismissed indictment." (Dkt. No. 219)

Mr. Kennedy began his service as a confidential law clerk to this Court on December 18, 2023. Since that date, Mr. Kennedy has had no involvement or input whatsoever as to this case. He has performed no substantive work to assist the Court with this case, nor has he had any substantive discussions with the Court regarding this case, including any of the issues that will be addressed at sentencing. To the extent that the Court has required the assistance of a law clerk in presiding over the case since the date of Mr. Kennedy's hire, any such assistance has been provided by another one of the Court's law clerks and not by Mr. Kennedy.

"[I]f a clerk has a possible conflict of interest, it is the clerk, not the judge, who must be disqualified." *See Mathis v. Huff & Puff Trucking, Inc.*, 787 F.3d 1297, 1311 (10th Cir. 2015) (recusal unwarranted where conflicted law clerk did not substantively participate in the case and took no part in drafting or researching). *See also Bartel Dental Books Co. v. Schultz*, 786 F.2d 486 (2d Cir. 1986) (disqualification has not been required where the [conflicted] clerk is not working on the case); *Hamid v. Price Waterhouse*, 51 F.3d 1411 (9th Cir. 1995) (judge's refusal to recuse herself proper where conflicted law clerk "did not work on the case" *i.e.*, "gave no advice and did no research"); *United States v. Martinez*, 446 F.3d 878 (8th Cir. 2006) (a district judge's recusal was not required from a criminal case in which her law clerk had previously assisted in the defendant's prosecution while working at the U.S. Attorney's Office and signed the indictment, where law clerk had been screened from the case and the district judge represented that the law clerk "has not and will not have any involvement whatsoever with [her] decisions in [the] case") (internal citations omitted).

For these reasons, defendant's motion to disqualify the Court is denied. Defendant's request for an extension of time is granted in part. Defendant's reply regarding his objections, no longer than five (5) pages in length, is due on **3/22/2024**; (2) the Government's response papers to legal arguments in defendant's sentencing memorandum is due on **3/25/2024**, and the parties shall submit any request for a non-Guideline sentence, in writing, on or before **3/25/2024**.

The sentencing will proceed, as scheduled, on Wednesday, March 27, 2024 at 10:00 AM.

SO ORDERED.

Dated: March 21, 2024
Buffalo, New York

s/Richard J. Arcara
HON. RICHARD J. ARCARA
United States District Judge